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SUPREME COURT OF THE UNITED STATES

November Term, 1978

No. 78-799

BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP, et al.,

Petitioners,

v.

HERBERT BARNESS, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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Olan B. Lowrey on behalf of the Board of Supervisors of Buckingham Township prays that a writ of certiorari issue to review the judgment of the Commonwealth Court of the Commonwealth of Pennsylvania in the captioned matter. Such judgment is dated January 25, 1978. The Supreme Court of the State of Pennsylvania refused to grant allocatur (certiorari) by order dated July 3, 1978 and entered of record on August 16, 1978.

Opinions Below

The opinion of the Common Pleas Court at the trial level in the State of Pennsylvania is reported at 29 Bucks Co. L.Rep. 280 (1976) and is included herein as Appendix 1. The opinion of the Commonwealth Court, intermediate appellate court and the Highest Court in the State of Pennsylvania that heard this matter, is reported at 33 Pa. Commw. Ct. 364, 382 A.2d 140 (1978) and is included herein as Appendix 2. The Supreme Court of Pennsylvania declined to hear the above case. Such order denying appeal was entered on August 16, 1978. It is included as Appendix 3. The docket entry sheet showing date of entry as "Counsel Advised of Order" is included as Appendix 4.

The Pennsylvania Supreme Court recognizes that the time within which petitioners must make a petition for rehearing to that Court begins to run on the date of entry of the order. Clearly, were this not so the seven day period within which to make motion for rehearing would quite frequently have expired prior to the time counsel was notified by mail, the letters being placed in the mail on

the day of entry. (See Appendix 4.) Though substantial periods of time frequently expire between the date of an order by the Pennsylvania Supreme Court and the date that it is entered of record, the rather lengthy period in this instance stemmed from the absence of a Mrs. Bierman who handles the allocatur docket. She was on vacation.

Jurisdiction

The jurisdiction of this Court is invoked under 28 USCA Section 1257(3), 62 Stat. 929 which authorizes this Court to review final judgment of decrees rendered by the highest court of a State by writ of certiorari where the validity of a state statute is drawn into question on the ground of it being repugnant to the United States Constitution.

Questions Presented

This action began, pursuant to Pennsylvania procedural law, before the Board of Supervisors of Buckingham Township in rural Bucks County, Pennsylvania. Eight constitutional challenges were filed after respondent landowners were apprised of the intent of the Township to rezone their land. The

argument was that the Township Zoning Ordinance constituted an unlawful interference with private property rights, that it was unconstitutional because it did not permit the property owners and developers to build or erect townshouses, multi-unit housing and mobile homes. The constitutional challenges were consolidated.

After extensive hearings the Board of Supervisors rejected the constitutional challenges and completed rezoning respondents' land for agricultural use as planned at the time the constitutional challenges were filed.

Their land was rezoned from a density of one house per acre to two houses per acre in an agricultural zone. The Supervisors held that the applicants had gained no vested right to develop free of the new zoning scheme known to them when they filed. Appeal was taken to the trial court level. The trial court ruled that the respondents had gained a vested right to develop their property at 6.3 to 10 units per acre in an area zoned for one unit per acre at the time of their chal-

lenge and rezoned for two units per acre at the time of the trial court hearing. Affirmance followed on the basis of the 5th and 14th Amendments to the Federal Constitution. The questions are:

1. Do resident property owners have standing to assert the rights of unnamed third persons to challenge under the 5th and 14th Amendments the constitutionality of a zoning ordinance on the ground that it is exclusionary?

2. Do property owners have standing to challenge under the 5th and 14th Amendments the constitutionality of a zoning ordinance where rezoning would grant no relief to them?

3. Is a rural township zoning ordinance unconstitutional under the 5th and 14th Amendments because a property owner is not allowed to build or erect townhouses, apartments or mobile homes?

4. Have respondents by making a constitutional challenge in response to a proposed zoning change gained under the 5th and 14th Amendments a vested right to develop without regard to Township zoning?

Constitutional Provisions Involved

Amendment V

"No person shall...be deprived of life, liberty, or property, without due process of law....

Amendment XIV

"Section 1. [N]or shall any State deprive any person of life, liberty, or property, without due process of law...."

...

Statement

As stated in Surrick v. Zoning Board of the Township of Upper Providence, et al., 476 Pa. 182, 382 A.2d 105, 107, 108 (1977) (Appendix 5), the exclusionary zoning doctrine in the State of Pennsylvania is based on the Pennsylvania Constitution as "circumscribed by the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution."

In June of 1972 petitioner Buckingham Township initiated the preparation of a comprehensive plan as a prelude to revising the Township Zoning Ordinance that dated in essential part back to 1952. The primary motivation for the Township's action was to protect

its agricultural industry which at that time, as now, was the primary industry in that rural part of Bucks County, Pennsylvania.

Inherent in the planning was the necessity to plan pursuant to the latest environmental standards and to at the same time meet certain judicially created criteria for zoning in the State of Pennsylvania. With respect to a far more highly populated township than rural Buckingham the Pennsylvania Supreme Court had shortly before held that there must be some provision for high density housing in order to avoid the zoning ordinance being set aside as unconstitutional in favor of a vested right to develop free of the zoning power. Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

The planning was envisioned as a prototype to stop urban sprawl and preserve farmland. The planning process was funded in part by the Department of Community Affairs in the State of Pennsylvania. Extensive input and assistance was given by planners from the University of Pennsylvania and elsewhere. The massive and seminal effort was to form the basis for and

act as a catalyst to such environmental planning throughout the State of Pennsylvania and the nation.

The planning proceeded with customary dispatch until such time as a comprehensive plan had been prepared and made known to the public through a series of public meetings and newspaper reports. The comprehensive plan contained colored maps explicitly designating the land of each of the respondents to be zoned for agriculture with limited development. State law required that the planning be public. Opening Meeting Law, Pa. Stat. Ann. tit. 65, §§ 261-269 (Purdon Supp. 1978); Pennsylvania Municipalities Planning Code, Pa. Stat. Ann. tit. 53, §§ 10101-11202 (Purdon).

The plan provided that a significant portion of the Township was to be rezoned as agricultural. Development was to take place primarily in a development district. The Township planned for high density housing and other development that would meet the needs of twice the number of people predicted by the Bucks County Planning Commission as likely to move into the Township over the next twenty years.

At such time as the intent of the Township to rezone was clear to several individuals owning property there eight challenges were made to the constitutionality of the existing zoning ordinance. The challenges alleged deprivation of private property rights and claimed a vested right to develop without regard to the then proposed zoning ordinance. The specific grounds alleged for unconstitutionality ranged from lack of express provision for mobile homes and townhouses to lack of express provision for multi-unit housing in the old 1952 Zoning Ordinance. It was known to respondents that the Township in its rezoning scheme was to provide for all of these things. The uncontested findings of fact show that seven had actual knowledge and that the eighth had constructive if not actual knowledge.

Under Pennsylvania procedural law the constitutional challenge was submitted first to the Board of Supervisors of Buckingham Township. After some thirty-eight hearings stretching over a protracted period the Board of Supervisors determined

to reject the constitutional challenges whereby the individuals sought to rezone their property for their personal economic benefit in a manner inconsistent with both the existing and proposed zoning ordinance. Instead, the Township passed the ordinance that it had been working on for some time before and during the protracted hearings on the constitutional challenges. In effect the Board held that respondents must comply with the new zoning ordinance of which they had knowledge when they filed their constitutional challenges.

Respondents appealed to the trial court level in Pennsylvania. The trial court reversed the Board of Supervisors, holding that the Township Ordinance was unconstitutional and therefore respondents had gained a vested right to develop eight thousand units of housing in derogation of both the new and old township ordinances. All of the lower courts refused to consider the new zoning ordinance.

The development proposed by respondents was on prime agricultural land known to them to be

scheduled to be zoned as agricultural land. The eight thousand units of housing proposed would house some six times the population projected to move into the Township during the ensuing twenty years. Respondents' proposals ranged as high as ten units of housing per acre.

An appeal was taken by the Township to the appropriate Pennsylvania intermediate court of appellate jurisdiction, the Commonwealth Court. That Court (Appendix 2) sustained the holding of the trial court that the individual respondents who filed the constitutional challenges had gained a vested right to develop their land as proposed by them. The intermediate appellate court affirmed the trial court in holding that the vested right gained by the individuals transcended the exercise of the police power by the Township to enact a new zoning ordinance applicable to respondents' land though they had filed their constitutional challenges with full knowledge of the intended rezoning of their land for primarily agricultural purposes.

The Township, the State Department of Environmental Resources, an environmental group called the Land Use Task Force and the Pennsylvania Society of Planners then petitioned for allocatur (certiorari) to the State Supreme Court. The State Supreme Court declined to grant allocatur.

Reasons for Granting the Writ

1. Resident property owners do not have standing to assert the rights of unnamed third persons to challenge under the 5th and 14th Amendments the constitutionality of a zoning ordinance on the ground that it is exclusionary. The writ should be granted because the decisions of the courts below are in direct conflict on this principle with that of this Court in Warth v. Seldin, 95 S.Ct. 2197, 422 U.S. 490 (1975). Respondent developers have been erroneously granted standing to assert the rights and legal interests of third parties not even named in the litigation as party's plaintiff. Every respondent is a property owner and resident of Buckingham Township. No respondent pleaded the names of any person or persons who were alleged to

be excluded.

In Warth certain individuals not resident in the town of Penfield and low-income housing organizations alleged that the town zoning was unconstitutional and in violation of 42 USCA 1981, 1982 and 1983. The evidence alleged was that some 98% of the town was zoned for single family detatched dwellings and only .03% was zoned for multi-unit housing. The relief requested was to declare the zoning ordinance of the town of Penfield unconstitutional and to order the defendants to enact a new ordinance designed to correct effects of their past actions.

This Court sustained a denial of standing to the low-income housing organizations on the ground that they could not represent the interests of third parties, stating at p. 2205:

> "...second even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this court has held that the plaintiff generally must assert his own legal rights and interest and cannot rest his claim to relief on the legal rights or interests of third parties."

On the same grounds this Court sustained a finding of no standing even as to certain individuals who had alleged a desire to live in the town, stating at p. 2207:

> "But the fact that these petitioners share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves had been excluded, or that the respondents' asserted illegal actions have violated their rights. Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, 'none may seek relief on behalf of himself or any other member of the class.'"

In Rasmussen v. City of Lake Forest, Illinois, 404 F.Supp. 148 (N.D. Ill. 1975), it was held that an individual making allegations under both the 14th Amendment equal protection clause as well as the substantive taking provision of the 5th Amendment had no standing to argue equal protection on behalf of third parties. Unfortunately, the second

half of his argument to the effect that he was being deprived of his property without due process of law was not addressed by the court because not properly briefed.

Further, in Surrick v. Zoning Board of the Township of Upper Providence, et al., 476 Pa. 182, 382 A.2d 105 (1977), it is made clear that the equal protection clause of the 14th Amendment has no relevance to the Pennsylvania exclusionary zoning decisions being decided pursuant to a substantive due process analysis under the 5th and 14th Amendments. 476 Pa. at 193, 382 A.2d at 110:

> "Different requirements pertain when it is alleged that a zoning ordinance perpetuates class-based or racially discriminatory housing patterns in violation of the Equal Protection Clause. In such a case, proof of this allegation would require evidence of racial or class-based motive. See Arlington Hts. v. Metro. Housing Dev. Co., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977). However, the instant case does not raise an equal protection challenge. Finally, it should be noted that the decisions of this Court which have struck down zoning schemes have focused the analysis upon the restriction on or exclusion of certain uses, not on the exclusion of certain classes of people."

It is clear that respondents, exclusively residents of the Township, are in no position to assert the alleged injury that has been suffered by other unidentified members of a class to which in this instance they do not belong but which they do impliedly purport to represent. The courts below had no grounds to consider a 5th and 14th Amendment challenge on the basis of unnamed third parties being excluded from the Township.

It is noted that the necessity to meet Federal standing principles in Federal constitutional litigation initiated in state court, as here, was implicitly affirmed in Regents of University of California v. Bakke, 98 S.Ct. 2733 (1978). This Court stated:

> "Several amici suggest that Bakke lacks standing, arguing that he never showed that his injury-- exclusion from the medical school--will be redressed by a favorable decision... Petitioner does not object to Bakke's standing, but inasmuch as this charge concerns our jurisdiction under Art. III, it must be considered and rejected." (fn. 14 at p. 2743)

The quote serves to introduce the next section.

2. Property owners do not have standing to challenge the constitutionality of a zoning ordinance where there is no probability that rezoning would be a benefit to them.

In Warth this Court sustained denial of standing to individual petitioners who alleged that they desired to live in the town of Penfield on the ground that there was no showing that even if the zoning ordinance were in fact revised to correct the alleged deficiencies that they themselves would benefit from the action, stating at p. 2208:

> "...Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantive probability that they would have been able to purchase or lease in Penfield and that, if the Court affords the relief requested, the asserted inability of petitioners will be removed."

and at p. 2209:

> "...Instead, they rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the Court to afford relief.
>
> [20, 21] We hold only that a plaintiff who seeks to challenge exclusionary zoning

> practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the courts' intervention."

The same principles must apply here. Even if the Township were forced to rezone, there was no reason for these individuals filing constitutional challenges to believe that their land would be included in a category that would ultimately* prove any more profitable to them than the manner in which it was currently zoned.

To the contrary, as known to respondents, a comprehensive plan had already been prepared for the Township that showed their land was to be rezoned primarily for agricultural use under circumstances where most of the land would have to remain undeveloped. Thus, there was no "substantial probability" that their land would be rezoned to their

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* Population expansion will ultimately create a demand for the density levels proposed. At that time being able to develop at 6.3 to 10 units per acre rather than .5 units per acre will add millions of dollars of value to the land.

satisfaction even if rezoned. In fact the zoning ordinance that was passed after hearings on the constitutional challenges provided for a density level of not more than one house for each two acres with not more than ten percent of the land to be utilized for housing.

In a closely related consideration it was stated in Warth:

...

> "...[T]his court has recognized other limits on the class of person who may invoke the court's decision on remedial powers. First, the court has held that when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." 422 U.S. at 499.

Respondents are simply property owners among thousands in Buckingham Township and their capacity to make more money by rezoning their property is shared in substantially equal measure by most property owners in the Township. This is because with farms and large lot development in a rural area almost every property owner could subdivide to his ultimate profit

if permitted to do so. This being the case, respondents had no standing to urge the 5th or 14th Amendment to challenge the constitutionality of the Township statute as it applied to all citizens. Rather, under this law and the facts of this case they are relegated to asserting only such rights under the 5th and 14th Amendments as they might have in relation to their own property. Those rights would be to prove the allegation made, as by Mr. Schlanger, that the Township Zoning Ordinance "... deprives Applicant of legitimate reasonable uses of his land without justification." As aptly stated in D. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION 94 (1977) respecting the right of a landowner to make a Federal due process challenge:

> "[F]or the landowner to make such a challenge, and unless he can prove something akin to outright confiscation, he must lean upon the rights of future residents."

Respondents cannot prove the first nor, under Warth, do the second.

3. A zoning ordinance in a rural township is not unconstitutional under the 5th and 14th Amend-

ments to the Federal Constitution because a property owner is not allowed to build or erect townhouses, apartments or mobile homes when there is no demand in the Township for higher density housing. The court below should be reversed because of a highly erroneous application of the 5th and 14th Amendments to the Federal Constitution to declare a zoning ordinance unconstitutional because it did not provide for townhouses, apartments and mobile homes.

The exclusionary zoning doctrine in the State of Pennsylvania has been repeatedly articulated by the State Supreme Court as a Federal constitutional issue. National Land and Investment Company v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965), Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) and Surrick v. Zoning Hearing Board of the Township of Upper Providence, 476 Pa. 182, 382 A.2d 105 (1977). The doctrine is essentially that all ordinary housing types and natural population densities must be permitted in every governmental planning unit. With irrelevant exceptions the planning units in Pennsylvania are township units.

Some ordinary uses have been defined as mobile home parks, East Pikeland Township v. Bush Bros., Inc., 13 Pa. Commw. Ct. 578, 319 A.2d 701 (1974); townhouses, Camp Hill Development Company, Inc. v. Zoning Board of Adjustment of Dauphin, 13 Pa. Commw. Ct. 519, 319 A.2d 197 (1974) and apartment buildings, Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

The Federal constitutional issue was most thoroughly discussed by the Supreme Court of Pennsylvania in Surrick (Appendix 5). That Court stated that the constituional standard being applied by all Pennsylvania courts on the issue of exclusionary zoning was based on Article I, Section 1 of the Pennsylvania Constitution as "circumscribed" by the 5th and 14th Amendments to the Federal Constitution, at p. 107:

> "Article I Section 1 of the Pennsylvania Constituion protects the citizen's right to the enjoyment of private property, and governmental interference with this right is circumscribed by the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution. U.S. Const. amends. V, XIV; Pa. Const. art. 1, § 1*; Girsh

* Quoted at p. 38.

> Appeal, 437 Pa. 237, 241 n. 3, 263 A.2d 395, 397 n. 3 (1970). In reviewing zoning ordinances, this Court has stated that an ordinance must bear a substantial relationship to the health, safety, morals, or general welfare of the community. National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 522, 215 A.2d 597, 607 (1965), citing, inter alia, Glorioso Appeal, 413 Pa. 194, 196 A.2d 668 (1964). Thus, without expressly labelling it as such, this Court has employed a substantive due process analysis in reviewing zoning schemes and has concluded implicitly that exclusionary or unduly restrictive zoning techniques do not have the requisite substantial relationship to the public welfare."

The focus now will be on the question of constitutionality under the 5th and 14th Amendments of the 1952 Township Ordinance as amended without regard to the possible rights of respondents if the ordinance were in fact unconstitutional.

It is assumed that the lower courts in invoking the 5th and 14th Amendments while rejecting any equal protection application of the 14th did so within the usual context, that is that the 14th serves to make the 5th applicable to the states and their subdivisions. The universal context of the

5th Amendment argument is that a property owner has been deprived by zoning of an opportunity to make any reasonable use of his property. Therefore, it has been taken without just compensation.

In the instant litigation a variation of this assertion was made by respondents but their primary emphasis was that the 1952 ordinance was unconstitutional because it did not provide for townhouses, multi-unit housing or mobile homes. No evidence was presented or argument made that there was no market demand for the one unit per acre zoning applicable to their properties. Respondents did argue and present evidence to the effect that they could make more money if their properties were zoned for a higher density. It is, of course, universally accepted that being able to make more money if zoned differently does not support a charge of taking. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

We are then dealing with the old fashioned and simple question of whether respondent developers could make a reasonable use of their property with

one acre zoning. The other side of the coin is the extent and scope of the police power to zone for the benefit of the majority. The seminal decision that dealt with both sides of that coin is Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). There, this Court in a case of first instance determined that breadth of the police power was such that a Township could under the facts zone in such a way as to diminish the value of private property by as much as 75%. In an effort to delineate the scope of the police power the Court stated it in broad terms indeed:

> "The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstance and condition." (p. 387)
>
> ...
>
> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." (p. 388)

After reminding the nation in Nectow v. City of Cambridge, 277 U.S. 183 (1928) that the po-

lice power was not entirely without limits, this Court left well enough alone until 1973 when it strongly reaffirmed that the police power is indeed still broad. Village of Belle Terre, et al. v. Bruce Borras, et al., 416 U.S. 1 (1974).

A far-reaching township ordinance prohibiting cohabitation by more than two persons unrelated by blood, adoption or marriage was sustained in a highly supportive decision written by Justice Douglas. In stressing the importance of government planning for the public benefit Justice Douglas held for the majority:

> "The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.
>
> [4,5] A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within Berman v. Parker, supra. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people." (95 S.Ct. 1541)

It is submitted that it is not seriously debatable that a Township can zone in a manner consistent with the market demand in the area where it is located. That it can do so is certainly "arguable".

In Buckingham Township when this litigation was initiated in 1974 the public records and evidence presented show a Township with some 7500 people, approximately twenty-one thousand acres and some 2200 dwelling units. Though the Township had in 1971 zoned land for densities of two and four units per acre no permits for development at either density level had been issued by March of 1974 when the constitutional challenges were initiated. On the other hand, over 400 permits had been issued during that interval for construction on lots of one acre or greater. No one wanted to develop at a higher density than one acre. Therefore, not only could the land of the developers be put to some reasonable use as zoned, it was zoned for its highest and best residential use at that point in time.

The converse of that fact is that the zoning clearly bore a substantial relationship to health,

safety and welfare.

None of the cases that are generally regarded as relevant to the issue of exclusionary zoning give any support to respondents' position in the instant litigation. In the highly publicized case of Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (1975), appeal dismissed and cert. den. 423 U.S. 803 (1975) and its progeny from the State of New Jersey the courts have carefully relegated the basis of their decisions to New Jersey law relating to the rights of non-residents.

Golden v. Planning Board of Town of Ramapo, 30 N.Y. 2d 359, 285 N.E. 2d 291, appeal dismissed, 409 U.S. 1003 (1972) out of New York sustained the exercise of the police power through a controlled growth statute against an allegation that controlling the rate of growth was a violation of the 14th Amendment to the Federal Constitution. Construction Industry Association of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), cert. den., 424 U.S. 934 (1976) was virtually the same case as Ramapo. Neither hints that zoning a property in a

manner consistent with its most economically fruitful use for residential purposes constitutes a taking. No cases decided outside Pennsylvania do.

It is respectfully submitted that nothing in the 5th or 14th Amendments as generally construed, or as they could be construed, lends even colorable support to the proposition of respondents that a zoning ordinance constitutes a taking without just compensation where land is zoned for residential use consistent with its greatest dollar value.

4. Respondents have not by making a constitutional challenge with knowledge of a proposed zoning change gained under the 5th and 14th Amendments to the Federal Constitution a vested right to develop without regard to either existing or proposed zoning in the Township.

If it is assumed arguendo that Buckingham Township's 1952 Zoning Ordinance is unconstitutional under the 5th and 14th Amendments, does that invalidity give to respondents a vested right to develop without regard to the zoning power?

Conceptually the same principle of deprivation of property without just compensation in violation of the 5th and 14th Amendments that controls the issue of constitutionality of the 1952 statute must control this issue as well. The difference lies between asking whether a person's property has been taken because it cannot be put to any reasonable use and whether a personal good faith expenditure made in reliance on an existing governmental standard is such that a vested right arises that permits development in defiance of existing and proposed zoning.

No case has been found from any jurisdiction, other than Pennsylvania and New Jersey (where only New Jersey law was relied upon) suggesting that even a successful challenge to the constitutionality of an ordinance gives a right to develop pursuant to any standard other than that in effect at the time a permit was requested. In Pennsylvania the courts have taken the unique position that the 5th and 14th Amendments automatically permit the developer to de-

termine his own density and style of housing, apparently because the existing statute has been declared to be unlawful in its entirety.

This is believed to be erroneous under any standard. First, in the instant case it is believed conclusive under Warth, as discussed, that respondents had no standing to challenge the statute in its entirety because they could not represent the interests of unnamed third parties, did not stand to benefit even if successful in securing a rezoning and were not affected differently from other citizens by the existing zoning.

Second, even if they had such standing they filed with full knowledge of the Township plans to rezone their land as agricultural.

In most cases a substantial expenditure has been required as well as good faith filing in reliance on existing planning, as in the cases that follow. Governments would function poorly with any other standard. It is one thing to permit a property owner to proceed pursuant to public planning already incorporated into the law for the public

benefit. It is totally another, as here, to permit development without regard to any standard other than private profit.

The general principle has been stated accurately in 8 E. MC QUILLAN, THE LAW OF MUNICIPAL CORPORATIONS, § 25, 133 (3rd ed. 1976):

> "However, it has been held that the doctrine of vested rights permits a landowner to complete a project in the face of a new law purporting to prohibit the development of the project where the landowner in reliance upon governmental action has in good faith suffered substantial detriment thereby acquiring a vested right to proceed to develop property."

As early as 1904 this Court in Dobbins v. Los Angeles, 195 U.S. 223 (1904) had adopted the same standard. The principle was applied in favor of an individual who had purchased land zoned so as to permit the erection of gas works. He obtained a permit for the erection of a gas works and began construction. A later municipal ordinance rezoned the land in question so that a gas works was not permitted. The action, it was held, constituted a taking under the due process clause of the 14th Amendment and was not, therefore, a proper exercise

of the police power. (p. 241)

So far as petitioners can determine the principle has been universally applied in all circuits, an example being the case of District of Columbia v. Cahill, 54 F.2d 453 (D.C. Cir. 1931). The Court stated the principle to be that:

> "... a party acting in good faith under affirmative acts of a municipal corporation, and making expensive and permanent improvements in reliance thereon, would unjustly and inequitably be deprived of the rights which the corporation had granted to him." (p. 455)

In the instant litigation, each developer had knowledge of a proposal by the Township to rezone his land for primarily agricultural use. The knowledge was personal as to every developer with one possible exception. The possible exception, Ciccone, had at least constructive knowledge because of a published comprehensive plan proposing to rezone his land as agricultural. The comprehensive plan was clear and unequivocal on this point. A color-coded map was appended showing that the land of each of the developers was to be zoned as agricultural.

Further, the record shows no expenditures in reliance on the existing planning. No surveys were made, nor streets laid out, no soil testing done or curbs or utilities put in in reliance on one acre zoning. No planning of any nature or degree was done pursuant to the one acre zoning that was in effect when each applicant filed a constitutional challenge. Rather, the developers proposed density levels ranging from 6.3 to 10 units per acre. The courts below granted them the right to develop at those densities. In effect, the developers have received court sanction to do their own zoning, thereby zoning solely and exclusively for their economic benefit without regard to the existing or proposed comprehensive plan or zoning ordinance.

A township must zone in relation to the public welfare. Respondents have been told that they may zone solely in relation to their own.

In this case, as a result of seven* constitutional challenges closely following one after the

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* One challenge was withdrawn.

other, some eight thousand housing units outside the zoning power are proposed for a rural township currently having only some two thousand five hundred units of housing. The picture is even more inexplicable when it is realized that there was no demand for higher density housing at the time it was proposed.

Conclusion

It is stressed that the decision in the instant case is not the mechanism by which a fair share of people are to live in Buckingham Township. At the time of the constitutional challenge the Township was already moving towards accepting over twice the number of people desiring to move into the Township. The proposals of the developer respondents would in aggregate exceed six times the expected population over the next twenty years.

It is further stressed that the lower court decisions are not designed to enable a reasonable use of property. They are by fair analysis decisions to enable developers to make enormously more

money than they otherwise could, and at the expense of their fellow citizens. All other property owners are bound by planning done for the benefit of the majority. If there were no zoning these respondents would not have gained anything. Their gain is based on the restrictions on development by other citizens. Only respondents are exempt from the zoning power.

By the lower courts' extraordinary decisions these respondents are to be allowed, at such time in the future as a market develops based on population expansion, to develop at a density of twenty times that of their neighbors. For the public good their neighbors are restricted and yet must bear the truly excessive density burden to be created by respondents' development free of the zoning power.

That one acre zoning in a rural township without a current market demand for greater density is legal is clearly "arguable" under Euclid. And, even if it were not, the Constitution gives no vested right to developers to zone for themselves independ-

ent of the police power. That too is at least "arguable."

Because of the importance of planning in a modern society, especially the preservation of agricultural land, because of the total negation of rational planning doctrine and because of totally erroneous application of the 5th and 14th Amendments, the lower courts should be reversed.

Respectfully submitted,

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A certificate of service is being filed by separate document.

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The provision of the Pennsylvania Constitution Article I, Section 1, "constrained" by the 5th and 14th Amendments reads:

> "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness."

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